IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**RULING: DEFENSE MOTION**
v.	)	**TO DISMISS SPECIFICATIONS**
	)	**2, 3, 5, 7, 9, 10, 11 AND 15 OF**
MANNING, Bradley E., PFC	)	**CHARGE II**
U.S. Army, (b) (6)	)	
HHC, U.S. Army Garrison	)	
Joint Base Myer-Henderson Hall	)	DATED: 8 June 2012
Fort Myer, Virginia 22211	)	

Defense moves this Court to dismiss Specifications 2, 3, 5, 7, 9, 10, 11, and 15 of Charge II as unconstitutionally vague in violation of the Fifth Amendment and overbroad in violation of the First Amendment. Alternatively, Defense moves the Court to provide limiting instructions. Government opposes dismissal. The Government joins the Defense in its request to provide instructions that define 18 U.S.C. § 793(e). After considering the pleadings, evidence presented, and argument of counsel, the Court finds and concludes the following:

Factual Findings:

1. In Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II, PFC Manning is charged with unauthorized possession and disclosure of classified information in violation of 18 U.S.C. Section 793(e) and Article 134, UCMJ.

2. 18 U.S.C. § 793(e) criminalizes "[w]hoever having unauthorized possession of, access to control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it."

The Law: Void for Vagueness.

1. A motion to dismiss a specification as being "void for vagueness" implicates the Due Process clause of the Fifth Amendment. To overcome a "void for vagueness challenge," a statute must be reasonably clear so as to provide warning of the type of conduct which is proscribed and provide standards sufficiently explicit to prevent arbitrary and capricious application. A statute is impermissibly vague if it "(1) fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) authorizes or even encourages

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arbitrary and discriminatory enforcement." *U.S. v. Shrader,* 2012 WL 1111654 (4th Circuit, 4 April 2012) *quoting Hill v. Colorado,* 530 U.S. 703, 732 (2000); *U.S. v. Amazaki,* 67 M.J.666 (A. Ct. Crim. App. 2009). "[T]he more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine-the requirement that a legislature establish minimal guidelines to govern law enforcement." Courts also consider any judicial or administrative limiting construction of a criminal statute in determining whether it is unconstitutionally vague. *Kolendar v. Lawson,* 461 U.S. 352, 355, 357, 358 (1983).

2. A person to whom a statute clearly applies has no standing to challenge successfully the statute under which he was charged for vagueness, *U.S. v. Morison,* 844 F.2d 1057 (4th Cir. 1988).

3. A *mens rea* requirement mitigates a law's vagueness especially with respect to actual notice of the conduct proscribed. *U.S. v. Moyer,* 2012 WL 639277 (3rd Cir. 2012) quoting *Gonzales v. Cartwright,* 550 U.S. 124, 149 (2007).

The Law: Substantially Overbroad.

1. A statute is facially overbroad when no set of circumstances exists under which it would be valid. *United States v. Salerno,* 481 U.S. 739, 745 (1987).

2. In the First Amendment context, a statute is "overbroad" when a substantial number of its applications are unconstitutional when compared with the statute's plainly legitimate sweep. *U.S. v. Stevens,* 130 S. Ct. 1577 (2010). First Amendment overbreadth challenges are an exception to the general rule that an accused does not have standing to litigate the rights of 3rd parties. *U.S. v. Morison,* 844 F.2d 1057 (4th Cir. 1988).

Analysis: Void for Vagueness – Phrase "Relating to the National Defense."

1. The phrase "relating to the national defense" is not defined in the statute. Defense argues the phrase is unconstitutionally vague because it gives no fair warning of what information comes within its sweeping scope.

2. In *Gorin v. United States*, 312 U.S. 19 (1941), the Supreme Court rejected a similar vagueness challenge to identical language in the Espionage Act, the predecessor to the statute at issue in this case. The Court held:

> National defense, the Government maintains, 'is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.' We agree that the words 'national defense' in the Espionage Act carry that meaning..... The language employed appears sufficiently definite to apprise the public of prohibited activities and is consonant with due process. *Gorin*, at 28.

3. Post-*Gorin* federal courts have consistently found that the phrase "relating to the national defense" in 18 U.S.C. section 793 is not unconstitutionally vague. *See U.S. v. Morison,* 844 F.2d 1057, 1071-1074 (4th Cir. 1988); *United States v. Kim,* 808 F. Supp. 2d 44 (D.D.C. 2011); *United*

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States v. Rosen, 445 F. Supp. 2d 602, 617-22 (E.D. Va. 2006), aff'd on other grounds, 557 F.3d 192 (4th Cir. 2009).

4. The Court agrees with the analysis in these cases and finds the phrase "relating to the national defense" in 18 U.S.C. 793(e) is not unconstitutionally vague.

Analysis: Void for Vagueness – Phrase "to the Injury of the United States or to the Advantage of Any Foreign Nation."

1. 18 U.S.C. Section 793(e) imposes an additional *scienter* requirement for transmission of information requiring that the accused "has reason to believe the national defense information could be used to the injury of the United States or to the advantage of any foreign nation."

2. The Supreme Court rejected a vagueness challenge to the predecessor statute on the basis of "the obvious delimiting words in the statute" requiring that defendants act with "intent or reason to believe that the information to be obtained is to be used to the injury of the United States or to the advantage of any foreign nation." *Gorin,* at 28-29. As a result, the Court found "no uncertainty in [the] statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law." *Id.* at 28.

3. The statute requires the accused to have acted "willfully. This *scienter* requirement the statute imposes when an individual is charged with transmitting "information relating to the national defense" mitigates the law's vagueness especially with respect to actual notice of the conduct proscribed. *See U.S. v. Ragen,* 314 U.S. 513, 524 (1942); *U.S. v. Kim,* 808 F. Supp. 2d 44 (D.D.C. 2011), *U.S. v. Moyer*, 2012 WL 639277 (3rd Cir. 2012) quoting *Gonzales v. Cartwright*, 550 U.S. 124, 149 (2007).

4. The Court agrees with the analysis in these cases and finds the phrase "to the injury of the United States or to the Advantage of any Foreign Nation" in 18 U.S.C. 793(e) is not unconstitutionally vague.

5. For the reasons set forth above, the Court finds that the combination of the phrases "relating to the national defense" and "to the Injury of the United States or to the Advantage of Any Foreign Nation" does not render the statute unconstitutionally vague.

6. Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II are not unconstitutionally vague. Vagueness concerns can be addressed with appropriate instructions. *U.S. v. Squillacote,* 221 F.3d 542 (4th Cir. 2000).

Analysis: Substantially Overbroad in Violation of the 1st Amendment.

1. Defense argues that 18 U.S.C. Section 793(e) is substantially overbroad in violation of the 1st Amendment because in regulates a substantial amount of protected speech and infringes on the freedom of the press to investigate and publish articles on national defense topics.

2. A similar overbreadth challenge was litigated in *U.S. v. Morison*, 844 F.2d 1057 (1988). The *Morison* court applied a 3 prong test to determine whether 18 U.S.C. 793(e) was overbroad in violation of the First Amendment: (1) is the government interest sought to be implemented too insubstantial or at least insufficient in relation to the inhibitory effects on First Amendment freedom? (2) do the means bear little relation to the asserted government interest? and (3) if the means do relate to a substantial government interest, can that interest be achieved by a method less invasive of free speech interests? The 4th Circuit held that 18 U.S.C. 793(e) (1) expresses a vital government interest in protecting national security; (2) the statute has a direct relation to the protection of the vital national security interest; and (3) judicial instructions can narrow the scope of a statute to ensure the statute is narrowly tailored to protect the vital national security interest.

3. The Court agrees with the 4th Circuit that 18 U.S.C. 793(e) expresses a vital government interest in protecting national security and that the statute has a direct relation to the protection of the vital national security interest. This Court can craft instructions to ensure that the statute is narrowly tailored to protect the vital national security interest.

4. Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II are not unconstitutionally overbroad in violation of the First Amendment.

Conclusion. Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II are not unconstitutionally vague nor substantially overbroad. The Court will provide appropriate instructions to fully inform the fact-finder of the elements of the offense and its definitions. The parties are invited to provide the Court with proposed instructions. The Court would greatly benefit from the actual instructions used to define elements and definitions in previous 18 U.S.C. 793 cases, to include *U.S. v. Kim,* 808 F. Supp.2d 44 (D.D.C. 2011); *U.S. v. Rosen,* 445 F.Supp. 2nd 602 (E.D. Va. 2006); *U.S. v. Squillacote*, 221 F.3d 542 (4th Cir. 2000); *U.S. v. Morison*, 844 F.2d 1057 (4th Cir. 1988); *U.S. v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 2000); and *U.S. v. Dedeyan*, 584 F.2d 36 (4th Cir. 1978).

RULING: Defense Motion to Dismiss Specifications 2, 3, 5, 7, 9, 10, 11 and 15, of Charge II is **DENIED.** The Court will draft instructions similar to those approved by the Fourth Circuit and invites the parties to submit proposed instructions for consideration.

ORDERED, this the 8th day of June 2012.

DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit

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